RAPIDIN KAMAL

v.

PP

COURT OF APPEAL, PUTRAJAYA
RICHARD MALANJUM JCA
MOHD GHAZALI YUSOFF JCA
HASHIM YUSOFF JCA
[CRIMINAL APPEAL NO: B-05-4-1998]
27 SEPTEMBER 2005

EVIDENCE: *Fresh or further evidence - Admission of, on appeal - Appeal against decision of High Court judge refusing application to admit further evidence - Principles applicable - Whether application fell within ambit of s. 317 Criminal Procedure Code - Whether judge had erred in exercise of discretion - Whether application tainted - Criminal Procedure Code, s. 317*

This was an appeal by the appellant against the decision of the learned High Court judge refusing his application to admit fresh evidence for consideration during the hearing of his appeal against the finding and decision of the Sessions Court made in connection with the charge preferred against him under s. 376 of the Penal Code. The application was made by way of a notice of motion pursuant to s. 317 of the Criminal Procedure Code ('the CPC') and the subject matter was to admit in evidence a purported 'Surat Akuan' or statutory declaration by the complainant in the charge preferred against the appellant. The appellant contended that the learned High Court judge, in rejecting the application, had erred in not following the test laid down in *Che Din Ahmad v. PP* and *Lau Foo Sun v. Government of Malaysia* concerning the admissibility of fresh or further evidence. The appellant also submitted that this court should not embark on making any finding of fact so as to cast doubt on the contents of the 'Surat Akuan'.

Held (dismissing the appeal)
Per Richard Malanjum JCA:

[1] The appellant had missed the crucial and decisive point in the judgment of the learned High Court judge. It was clear that the learned judge was of the view that the appellant's application did not come within the ambit of s. 317 of the CPC. Obviously, the learned judge did not find that the appellant had crossed the first hurdle in s. 317 of the CPC; hence, it would be premature to consider whether the test laid down in *Che Din (supra)*

had been complied with. In any event, the power to admit additional evidence under s. 317 of the CPC was discretionary and in the instant appeal, this court was not convinced that the learned judge had erred in his exercise of discretion to refuse admission of the 'Surat Akuan' as additional evidence for the purpose of the appeal. Further, although the appellant also submitted that this court should not make any finding of fact so as to cast doubt on the contents of the 'Surat Akuan', it was clear that the appellant had approached and sought to persuade the complainant to retract her complaint and the evidence she had given in court. Even if the complainant had indeed made the 'Surat Akuan', such an enterprise of approaching the complainant or any witness tottered on the fine line bordering upon tampering with evidence and, so tainted, it could not be used to affect the earlier sworn testimony given in court before the trial judge. It tainted the parties that undertook such an enterprise and it, without question, tainted the appellant's application.

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan yang arif hakim Mahkamah Tinggi kerana menolak permohonannya untuk memasukkan bukti baru semasa pendengaran rayuannya terhadap keputusan Mahkamah Sesyen yang dibuat berkaitan satu pertuduhan di bawah s. 376 Kanun Keseksaan terhadapnya. Permohonan dibuat melalui notis usul di bawah s. 317 Kanun Prosedur Jenayah ('KPJ') dan perkaranya adalah untuk memasukkan sebagai keterangan Surat Akuan yang dibuat oleh pengadu dalam kertas pertuduhan yang berkenaan. Perayu menyatakan bahawa yang arif hakim Mahkamah Tinggi, dalam menolak permohonannya, telah khilaf kerana tidak menuruti ujian yang dibentangkan di dalam *Che Din Ahmad v. PP* dan *Lau Foo Sun v. Government of Malaysia* berkaitan penerimaan masuk bukti-bukti baru atau tambahan. Perayu juga berhujah bahawa mahkamah semasa tidak harus membuat sebarang dapatan fakta yang boleh membangkitkan keraguan terhadap kandungan Surat Akuan.

Diputuskan (menolak rayuan)
Oleh Richard Malanjum HMR:

[1] Perayu terlepas pandang perkara terpenting dalam penghakiman yang arif hakim Mahkamah Tinggi. Adalah jelas bahawa yang arif hakim berpendapat bahawa permohonan perayu tidak dirangkumi oleh s. 317 KPJ. Jelas bahawa yang arif hakim tidak mendapati bahawa perayu telah memenuhi syarat pertama s. 317 KPJ; oleh itu adalah terlalu awal untuk mempertimbang sama ada ujian seperti yang dibentang di dalam *Che Din (supra)* telah dipatuhi. Walau bagaimanapun, kuasa untuk menerima masuk

bukti tambahan di bawah s. 317 KPJ adalah bersifat budi bicara, dan dalam rayuan semasa, mahkamah ini tidak berkeyakinan bahawa yang arif hakim telah khilaf dalam pelaksanaan budi bicaranya apabila menolak Surat Akuan sebagai bukti tambahan bagi maksud rayuan. Selain itu, walaupun perayu juga berhujah bahawa mahkamah ini tidak harus membuat dapatan fakta yang akan membangkitkan keraguan terhadap kandungan Surat Akuan, adalah jelas bahawa perayu telah berjumpa pengadu dan memintanya menarik balik aduannya serta keterangan-keterangan yang diberikannya di mahkamah. Jikapun benar bahawa pengadu tersebut telah membuat Surat Akuan, perbuatan berjumpa dengan pengadu itu atau mana-mana saksi adalah satu perbuatan yang hampir kepada mengganggu bukti yang perlu dicerca, dan, disebabkan kecemaran itu, ia tidak boleh diguna untuk menjejaskan keterangan bersumpah terdahulu yang diberi di mahkamah di hadapan hakim bicara. Ia telah mencemari pihak-pihak yang berkelakuan sedemikian dan ia, tanpa ragu, telah mencemari perayu.

Case(s) refered to:
Che Din Ahmad v. PP [1976] 1 MLJ 289 ***(refd)***
Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 317
Penal Code, s. 376

For the appellant - George Proctor; M/s Woo & Proctor
For the respondent/prosecution - Nurul Huda DPP

[Appeal from High Court, Shah Alam; Criminal Application No: 44-17-96]

Reported by Suresh Nathan

JUDGMENT

Richard Malanjum JCA:
Before us was an appeal by the appellant against the decision of the learned High Court Judge refusing his application to admit fresh evidence for consideration during the hearing of his appeal against the finding and decision of the Sessions Court made in connection with the charge preferred against him under s. 376 of the Penal Code.

The application was made by way of notice of motion pursuant to s. 317 of the Criminal Procedure Code. The subject matter of the application was to admit in evidence a purported 'Surat Akuan' or statutory declaration by the complainant in the charge preferred against him.

After hearing the submissions of the learned counsel for the appellant and the learned deputy public prosecutor, we dismissed the appeal as we did not find any error in the judgment of the learned High Court Judge. We indicated that we would give our reasons later. We do so now.

In his submission learned counsel for the appellant complained that when rejecting the application of the appellant the learned High Court Judge erred in not following the test as laid down in *Che Din bin Ahmad v. Public Prosecutor* [1976] 1 MLJ 289 and *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 namely:

1. that the evidence sought to be introduced must be evidence not available at the time of the trial even with reasonable diligence;

2. that the evidence must be relevant;

3. that it must be credible evidence although it need not be incontrovertible; and

4. that the court after considering the evidence, should proceed to consider whether there might have been reasonable doubt in the minds of the trial court (jury) as to the guilt of the accused if such evidence had been before the trial court together with the other evidence adduced.

We have read and reread the judgment of the learned High Court Judge. And in our view learned counsel for the appellant had missed the crucial and decisive point in the judgment. It is clear from the judgment that the learned judge was of the view that the application of the appellant did not come within the ambit of s. 317. This is what he said:

> The application before this Court is for the Court to use and consider the "Surat Akuan". That document and the procedure proposed in the application is not known to section 317. The only evidence that could be considered is such evidence as taken by the Judge himself, or by his direction, by a Magistrate. It is essential that the evidence to be taken into consideration must comply with the provisions of the Criminal Procedure Code. Thus in *Mohamed bin Jamal v. Public Prosecutor*, the evidence of and demonstration by the chemist was disallowed by the Federal Court because there was no evidence on record that the chemist had been sworn before the Judge. Neither was there on record that the other parties were given the opportunity to cross-examine the chemist.

Obviously the learned judge did not find that the appellant had crossed the first hurdle in s. 317. Hence it would be premature to consider whether the test as laid down in *Che Din bin Ahmad (supra)* had been complied with. With respect we have no reason to disagree with the conclusion arrived at by the learned High Court Judge.

In any event the power to admit additional evidence under s. 317 is discretionary. The learned judge was correct in his approach when he said this:

> In *John Sze Lee v. Public Prosecutor* Mallal's Digest 4th Ed Vol 5 p 40, Chong Siew Fai J (as His Lordship then was) held that section 317 of the Criminal Procedure Code gives discretionary power to admit additional evidence if it is necessary in the interest of justice. Such discretion has to the exercised sparingly.

In this instant appeal we are not convinced that the learned judge erred in his exercise of discretion to refuse admission of the surat akuan as additional evidence for the purpose of the appeal by the appellant.

Learned counsel for the appellant also submitted that this court should not embark in making any finding of fact so as to cast doubt on the contents of the surat akuan. To this we gladly adopt what was said by the learned judge in cautionary fashion:

> The affidavit however discloses that the complainant is unlikely to give evidence to the effect as suggested by the applicant as contained in the "Surat Akuan" which the complainant strongly disputed. It is clear in this case that the applicant approached and sought to persuade the complainant to retract her complaint and the evidence that she had given in Court. In such circumstances, the "Surat Akuan" is irrelevant on the consideration of the trial judge in coming to her decision.
>
> Even if the complainant had indeed made the "Surat Akuan", such enterprise of approaching the complainant or any witness, totters on the fine line bordering upon tampering with evidence. So tainted, it cannot be used to affect the earlier sworn testimony given in court before the trial judge. It taints the parties that undertook such enterprise. It is not enough that it is included in the affidavit of the applicant that his lawyers would have nothing to do with the exercise: the use by the lawyers of the fruits of such exercise similarly taints the lawyers. And without question it taints this application.

Accordingly, for the above reasons we dismissed the appeal of the appellant.